Supreme Court of Vermont.

EASTERN TOWNSHIPS BANK *v.* BEEBE & CO.

A company, doing business in Canada, composed of members, some of whom lived in Canada and some in Vermont, indorsed a note to a bank. The bank brought suit in Canada and obtained judgment against the company as indorser. In an action based upon the same promise as the Canada suit. *Held*,

1. The foreign judgment does not merge the cause of action, and assumpsit will lie upon the same cause in Vermont.

2. The foreign judgment is of no higher nature as a cause of action than the notes declared on.

A domestic judgment constitutes of itself a debt of record; a foreign judgment is only *prima facie* evidence of indebtedness; the one is a contract of record, incontrovertible, and is the basis of an action of debt, while only an action of assumpsit or debt on simple contract will lie upon the other.

THE defendant company, which was composed of members living in Vermont and of others living in Canada, being sued in Vermont, pleaded that plaintiff had previously sued and obtained judgment in Canada for the same debt.

John Young and *Crane & Alfred*, for plaintiff.

Edwards & Dickerman, for defendants.

The opinion of the court was delivered by

BARRETT, J.—It is not claimed that the pendency of the suit in Canada when this suit was brought could bar a recovery in this suit. It is claimed that the judgment in said suit in Canada, rendered after the bringing of this suit, bars a recovery in this suit.

It is not averred or claimed that said Canadian judgment has been satisfied by payment. So the only question is, whether said Canadian judgment merges the cause of action in such a sense as to render it incapable of being the subject of a judgment in this suit. It is not so merged unless it has become a debt of record, so that the record itself has become a cause of action of its own vigor, to be declared upon as such, and when produced, is conclusive of the right.

All the authorities agree that a suit in Vermont for getting satisfaction of the Canadian judgment must be an action of assumpsit, counting upon an implied promise arising from the fact of the existence of such judgment. It is held in the cases that a foreign judgment when shown in evidence upon a matter within the juris-

diction of the court and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so *merged* by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered.

The books are uniform in making the distinction between *merger* of the cause of action and conclusiveness of effect as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action.

Whatever may be the reason for such distinction, it exists and is established as a rule of law, and we see no occasion for annulling that rule in this state. In the many cases in which the subject of judgments, as between the different states of the Union, has been discussed and determined, the theory and logic have rested upon the provision of the United States Constitution as to the faith and credit to be given to judgments of one state in the other states, and in all the cases it is assumed that but for such provision such judgments would not have that faith and credit, and would be foreign judgments.

A specimen case of this kind is *McGilvray & Co.* v. *Avery*, 30 Vt. 538, in which the very able opinion drawn up by Judge BENNETT presents the established doctrine and marks the true distinctions. It is fundamental that a foreign judgment does not constitute a record debt, but is only *evidence* of obligation to pay. The indebtedness evidenced by a foreign judgment as a cause of action to be declared on, as the ground of recovery is that of *simple* contract, and the subject for a suit in assumpsit.

In this case then, the judgment in Canada as a *cause of action* is of no higher grade than the notes themselves. This legal fact is conclusive against the idea of the notes as a cause of action being merged by that judgment. It leaves that judgment as an instrument or means of evidence, showing conclusively the fact of indebtedness and operating conclusively to that effect until satisfied. It is not the judgment but the satisfaction of it that renders it a bar to a recovery in the domestic government upon the original cause of action. This is in harmony with the conclusive effect given to a foreign judgment in favor of the defendant. The fact of such judgment is pleaded in bar, and is adduced as evidence to

maintain the plea. This is the same, *mutatis mutandis*, as adducing the fact of a foreign judgment for the plaintiff to maintain his right of recovery against the defendant in his action of assumpsit upon that judgment. The confusion on this subject seems to result from not distinguishing between a domestic judgment as constituting of itself a *debt* of *record* and a foreign judgment, which is only evidence of an indebtedness as upon a simple contract.

Judgment reversed and cause remanded.

Supreme Court of Ohio.

PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY *v.* BARRETT ET AL.

Where goods are received by a common carrier to be forwarded in the usual course of business, his liability immediately attaches; and if they are lost by an accidental fire while in his warehouse awaiting transportation, he is liable.

But if the delivery is accompanied with instructions not to forward until further orders, or if anything remains to be done to the goods by the shipper before they are to be forwarded, such liability as a common carrier does not attach.

The assent of the shipper to conditions in a bill of lading or other contract for the carriage of goods, limiting the carrier's liability, is binding upon him when the loss happens without fault or negligence of the carrier, but such assent will not be implied or presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded.

Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common-law liability.

ERROR to the District Court of Greene county.

On the 22d of February and 5th of March 1873, Barrett & Walton delivered to plaintiff in error, a common carrier by rail, one hundred and forty tierces of lard, to be shipped to Colgate & Co., New York, to whom it had been sold deliverable on the cars at Spring Valley station, on the line of defendant's road. On the night of March 14th, while the lard was stored in defendant's warehouse awaiting shipment, it was destroyed by an accidental fire which originated in a store adjoining the warehouse, and without fault or negligence of the plaintiff in error, communicated to and destroyed the warehouse and all its contents.

The lard was delivered with instructions for immediate shipment. Nothing remained to be done to it by the shippers before